Bank Utama (M) Bhd v Cascade Travel & Tours Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–1163 OF 1998
KAMALANATHAN RATNAM J
22 JUNE 2000

Evidence *— Documentary evidence — Computer printout — Statements of account produced by computer tendered as exhibit to affidavit — Failure to tender certificate under s 90A(2) of Evidence Act 1950 — Whether document deemed to be produced by computer in the course of its ordinary use — Whether Bankers' Books (Evidence) Act 1949 prevail — Evidence Act 1950 ss 90A(2), (6) & 90C — Bankers' Books (Evidence) Act 1949 ss 3, 4 & 5*

The plaintiff applied by way of foreclosure proceedings to sell two units of property belonging to the defendant and charged to the plaintiff pursuant to three loan facilities provided to the defendant. The plaintiff attempted to tender as an exhibit, CSW-4 to its affidavit, statements of account of the plaintiff which were produced by computer as proof that the overdraft facilities had been disbursed and/or utilized by the defendant. The defendant challenged the admissibility of the documents as evidence on the ground that the plaintiff had failed to tender to the court a certificate stating that the documents were produced by a computer in the course of its ordinary use pursuant to the mandatory requirement of s 90A(2) of the Evidence Act 1950 ('the Act'). The defendant argued that since the documents tendered were produced by a computer and was not a copy of any entry in a banker's book, the documents were not therefore admissible as evidence under s 90A of the Act as the plaintiff had failed to produce a certificate under s 90A(2) of the Act. The plaintiff argued that since exh CSW-4 was part of the affidavit and since the Act did not apply to affidavits, s 90A ought not to apply in this case. It was also argued that once the provisions of ss 4 and 5 of the Bankers' Books (Evidence) Act 1949 ('the BBEA') were complied with, pursuant to s 3 of the BBEA, a copy of any entry in a banker's book shall, in all legal proceedings, be received as prima facie evidence of such entry. The plaintiff also contended that by virtue of s 90A(6), so long as a document is produced by a computer, it is deemed to be produced by the computer in the course of its ordinary use.

Held:

(1) Once a challenge is taken to the affidavit or to the exhibit annexed to it, it must be properly proved. Section 2 of the Act does not assist the plaintiff in this case and the documents must be properly proved pursuant to s 90A of the Act (see p 587C).

(2) Section 90C of the Act states that the provisions of ss 90A and 90B shall prevail and have full force and effect notwithstanding

anything inconsistent therewith, or contrary thereto, contained in any other provision of this Act or in the Bankers' Books (Evidence) Act 1949, or in any provision of any written law relating to certification, production or extraction of documents or in any rule of law or practice relating to production, admission, or proof, of evidence in any criminal or civil proceeding. Therefore, the provision of s 90A(2) of the Act must prevail over the BBEA and any attempt to circumvent the strict requirement of s 90A(2) must fail (see p 588C–E).

(3) The submission that pursuant to s 90A(6), so long as a document is produced by a computer it is deemed to be produced by the computer in the course of its ordinary use, blindly bypasses the need to satisfy the requirement of s 90A(2) of the Act. It is only after sub-s (2) has been complied with that sub-s (6) becomes effective (see p 588F).

[Bahasa Malaysia summary

Plaintif telah memohon melalui prosiding-prosiding penutupan untuk menjual dua unit hartanah milik defendan dan digadaikan kepada plaintif menurut tiga perjanjian pinjaman yang diberikan kepada defendan. Plaintif cuba mengemukakan sebagai ekshibit, CSW-4 kepada afidavitnya, pernyataan akaun plaintif yang dikeluarkan oleh komputer sebagai bukti bahawa kemudahan-kemudahan overdraf telah diberikan dan/atau digunakan oleh defendan. Defendan mencabar kebolehterimaan dokumen tersebut sebagai keterangan, atas dasar bahawa plaintif gagal untuk mengemukakan kepada mahkamah sijil menyatakan bahawa dokumen-dokumen dikeluarkan oleh komputer di dalam penggunaan biasanya menurut keperluan mandatori s 90A(2) Akta Keterangan 1950 ('Akta tersebut'). Defendan menghujahkan bahawa oleh kerana dokumen-dokumen yang dikemukakan dikeluarkan oleh komputer dan bukanlah salinan sebarang kemasukan di dalam buku bank, dokumen-dokumen adalah tidak boleh diterima sebagai keterangan di bawah s 90A Akta tersebut kerana plaintif gagal untuk mengemukakan sijil di bawah s 90A(2) Akta tersebut. Plaintif menghujahkan bahawa oleh kerana eksh CSW-4 adalah sebahagian daripada afidavit tersebut dan oleh kerana Akta tersebut tidak terpakai kepada afidavit-afidavit, s 90A tidak sepatutnya terpakai di dalam kes ini. Juga dihujahkan bahawa selepas peruntukan-peruntukan di dalam ss 4 dan 5 Akta Buku Banker (Keterangan) 1949 ('BBEA') dipatuhi, maka menurut s 3 BBEA, suatu salinan kemasukan di dalam buku bank, akan di dalam semua prosiding-prosiding diterima sebagai keterangan prima facie kemasukan sedemikian. Plaintif juga menegaskan bahawa menurut s 90A(6) selagi suatu dokumen dikemukakan oleh komputer ia dianggap sebagai dikemukakan oleh komputer di dalam penggunaan biasanya.

Diputuskan:

(1) Selepas suatu cabaran dibuat ke atas afidavit atau ekshibit yang dilampirkan bersamanya, maka ia mestilah dibuktikan dengan wajar. Seksyen 2 Akta tersebut tidak membantu plaintif di dalam kes ini dan dokumen-dokumen mestilah dibuktikan dengan wajar menurut s 90A Akta tersebut (lihat ms 587C).

(2) Seksyen 90C Akta tersebut menyatakan bahawa peruntukan-peruntukan ss 90A dan 90B akan mendahului dan mempunyai kesan penuh tidak kira apa-apa yang tidak konsisten di dalamnya, atau bercanggah padanya, yang terkandung di dalam peruntukan lain di dalam Akta ini atau di dalam Akta Buku Banker (Keterangan) 1949, atau di dalam sebarang undang-undang bertulis berkenaan dengan pensijilan, pengemukaan dan pengeluaran dokumen-dokumen atau di dalam sebarang peraturan undang-undang atau amalan berkenaan dengan pengeluaran, pengakuan atau bukti, mengenai keterangan di dalam sebarang prosiding jenayah dan sivil. Oleh itu, peruntukan s 90A(2) Akta tersebut mestilah mendahului BBEA dan sebarang cubaan untuk membelakangkan keperluan ketat s 90A(2) mestilah gagal (lihat ms 588C–E).

(3) Hujahan bahawa menurut s 90A(6), selagi dokumen dikemukakan oleh sebuah komputer ia dianggap dikeluarkan oleh komputer di dalam perjalanan penggunaan biasanya, secara membuta-tuli membelakangkan keperluan untuk memuaskan s 90A(2) Akta tersebut. Ia hanya selepas sub-s (2) telah dipatuhi bahawa sub-s (6) menjadi efektif (lihat ms 588F).]

Notes

For cases on computer printout, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 918–921.

Cases referred to

Gnanasegaran a/l Pararajasingam v PP [1997] 3 MLJ 1 (refd)
Gomez v Gomez [1969] 1 MLJ 228 (refd)
Standard Chartered Bank v Mukah Singh [1996] 3 MLJ 240 (refd)

Legislation referred to

Bankers' Books (Evidence) Act 1949 ss 3, 4, 5
Evidence Act 1950 ss 2, 32, 73A, 90A(2), 90A(6), 90C

Chang Wei Mun (*Raja Darryl & Loh*) for the plaintiff.
Wong Yuen Hock (*SL Tan & Associates*) for the defendant.

Kamalanathan Ratnam J:

Facts

The plaintiff applied by way of foreclosure proceedings to sell two units of property ('the property') belonging to the defendant and charged to the plaintiff pursuant to three loan facilities provided to the defendant, namely:

(1) an OD facility for RM500,000;

(2) a bank guarantee for RM200,000; and

(3) a second OD facility for RM350,000.

In response to the denial by the defendant as to the actual amount owed to the plaintiff and also in response to the defendant's contention that the plaintiff had failed to produce any proof that the overdraft facilities had been disbursed and/or used by the defendant, the plaintiff attempted to tender as an exh CSW-4 to its affidavit (encl 10), statements of account of the plaintiff which were produced by computer ('the documents') as proof that the overdraft facilities had been disbursed and/or utilized by the defendant.

The preliminary objection

The defendant now challenges the admissibility of the documents as evidence, on the ground that the plaintiff had failed to tender to the court a certificate stating that the documents were produced by a computer in the course of its ordinary use pursuant to the mandatory requirement of s 90A(2) of the Evidence Act 1950 ('the Act'). Relevant portions of s 90A of the Act read as follows:

> Admissibility of documents produced by computers, and of statements contained therein
>
> (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.
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> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used. ...
>
> (6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

Notice of the objection had been given well in advance.

Findings of the court

The defendant argued that since the documents tendered were produced by a computer and is not a copy of any entry in a banker's book, the documents are not therefore admissible as evidence under s 90A of the Act as the plaintiff had failed to produce a certificate under s 90A(2) of the Act. The defendant relied on *Standard Chartered Bank v Mukah Singh* [1996] 3 MLJ 240 where the court had held that it was only if the evidence was challenged as to its admissibility that it was necessary to produce the certificate under s 90A(2) of the Act. Since this challenge was taken in its affidavit itself, and since the plaintiff had not produced the certificate, as such the defendant called for the expunging and/or cancellation of all such documents from the court's record.

Are the documents admissible under s 2 of the Act?

Section 2 of the Act reads as follows:

> Extent
> This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

The plaintiff submitted that a plain reading of this section means that the Evidence Act does not apply to affidavits presented to any court. It was the plaintiff's case that since exh CSW-4 was part of the affidavit (encl 10) and since the Act did not apply to affidavits, equally s 90A ought not to apply in this case. In *Gomez v Gomez* [1969] 1 MLJ 228 the respondent, who was the former wife of the applicant, successfully obtained a divorce from him. Both were Catholics. The respondent was granted custody of their child and the applicant given access to visit her. The respondent later married a Hindu and the applicant applied by way of summons in chambers to vary the order of custody. One of the grounds in support of that application was the remarriage of the respondent to a Hindu. The respondent then obtained a letter from the assistant priest of the Catholic Church she attended, who stated in the said letter that the respondent was 'still capable of taking care of her child's religious and moral upbringing'. The applicant retorted in an affidavit that 'in the eyes of the Roman Catholic Church by divorcing her husband and marrying a Hindu she is living in sin and cannot practise the religion whilst continuing to live in daily sin.' The applicant thus applied for leave to cross-examine the respondent and the assistant priest who signed the said letter. It was argued for the respondent that whilst the court could allow for cross-examination of the respondent, the court could not allow the assistant priest to be cross-examined as he never deposed to any affidavit. Raja Azlan Shah J (as his Highness then was) said at p 230:

> ... The respondent says that she is still capable of looking after the child's religious and moral upbringing. The Rev. Father Wood supports her. It is the same as if he has sworn an affidavit to that effect. It is therefore only fair and proper that the appellant be allowed to cross-examine them on their affidavits.

A The exhibit, namely, the letter, was deemed part of the affidavit and cross-examination or the letter was therefore allowed.

Whilst s 2 no doubt says that the Act does not apply to affidavits and by virtue of the decision in *Gomez v Gomez* it ought also not to apply to exhibits annexed to the affidavits, acceptance of the plaintiff's argument gives a too B simplistic approach to the challenge raised by the defence. Whilst the Act does not apply to affidavits it does not mean that an affidavit by a living person can be admitted as evidence proprio vigore without the necessity of him taking the witness stand. In order for such evidence to be admissible it should be capable of being regarded as a statement falling under s 32 (cases in which statement of relevant fact by person who is dead or cannot C be found, etc, is relevant) or under s 73A (admissibility of documentary evidence in civil cases, etc) of the Act. Once a challenge is taken to the affidavit or to the exhibit annexed to it, then it must be properly proved. Therefore it is my judgment that s 2 does not assist the plaintiff in this case and the documents must be properly proved pursuant to s 90A of the Act.

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Are the documents admissible under the Bankers' Books (Evidence) Act 1949 ('the BBEA')?

It is necessary to reproduce the relevant sections of the BBEA:

E 2 In this Act, unless the context otherwise requires:

...

'banker's book' includes any ledger, day book, cash book, account book and any other book used in the ordinary business of a bank; ...

3 Subject to this Act, a copy of any entry in a banker's book shall in all legal F proceedings be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded.

4 (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is first proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the G book is in the custody or control of the bank.

(2) Such proof may be given by an officer of the bank, and may be given orally or by an affidavit sworn before any magistrate or person authorized to take affidavits

5 (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that the copy has been examined H with the original entry and is correct.

(2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any magistrate or person authorized to take affidavits.

It would seem that once the provisions of ss 4 and 5 of the BBEA are I complied with, then pursuant to s 3 of the BBEA, a copy of any entry in a banker's book shall, in all legal proceedings be received as prima facie evidence of such entry. The plaintiff then referred to encl 14 which is the

affidavit of one Ch'ng Seong Wah, the plaintiff's branch manager, who affirmed the affidavit based on records within his possession and from his own personal knowledge. Referring to the exhibit in question, namely, exh CSW-4, he averred that the exh CSW-4 contained a true account of the statements of the overdraft accounts of the defendant that had been sent to the defendant each month. These statements were taken from the books of the plaintiff kept in the normal course of business and that the records were at all material times within his custody and control. Having compared the contents of exh CSW-4 with the original from the books he averred that the contents of exh CSW-4 were true and correct.

Unfortunately however for the plaintiff s 90C of the Act reads as follows:

> Sections 90A and 90B to prevail over other provisions of this Act, the Banker's Books (Evidence) Act 1949, and any written law
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> The provisions of ss 90A and 90B shall prevail and have full force and effect notwithstanding anything inconsistent therewith, or contrary thereto, contained in any other provision of this Act, or in the Bankers' Books(Evidence) Act 1949, or in any provision of any written law relating to certification, production or extraction of documents or in any rule of law or practice relating to production, admission, or proof, of evidence in any criminal or civil proceeding.

In the circumstances, therefore, the provision of s 90A(2) of the Act must prevail over the BBEA and any attempt to circumvent the strict requirement of s 90A(2) must fail.

If s 90A applies, has it been complied with?

The plaintiff now contends that by virtue of s 90A(6) so long as a document is produced by a computer it is deemed to be produced by the computer in the course of its ordinary use and therefore the plaintiff seeks the admission of the documents contained in exh CSW-4. This submission blindly bypasses the need to satisfy the requirement of s 90A(2) of the Act. It is only after sub-s (2) has been complied with that sub-s (6) becomes effective. In *Gnanasegaran a/l Pararajasingam v PP*[1997] 3 MLJ 1 the Court of Appeal held that the defence merely challenged the admissibility of the computerized documents for failing to comply with s 90A(2) in that no certificate was produced. The Court of Appeal held that proof of the contents of the computerized documents can either be by producing a certificate signed by someone solely in charge of the computer which produced the printout as required by s 90A(2) or by an officer of the bank. In that case the bank officer testified with regard to the documents because he was in charge of the operations of the current accounts and the bank officer was not challenged by the appellant on the accuracy of the entries of the documents produced. It is obvious that viva voce evidence was adduced by the bank officer, albeit, not challenged. Such oral testimony is clearly admissible and does not fall foul of s 2 of the Act. Since in the case before me the plaintiff chose to proceed by way of originating summons all evidence must be by way of affidavit evidence. In the circumstances, since

A no leave has been applied to adduce oral evidence, what is before me is exh CSW-4 which has breached s 90A(2) of the Act.

The preliminary objection of the defendant is well taken.

The defendant has asked me to dismiss the entire originating summons as without the documents as contained in exh CSW-4 which now stands B rejected, there is no evidence to substantiate the alleged amount owed under the overdraft facilities. The plaintiff has submitted 'that there are many affidavits which show the amount owing by the defendant to the plaintiff' and that they would be referred to at the hearing of encl 1. It is therefore fair and proper that I hear the parties on encl 1. I will allow the defendant the costs of the preliminary objection in any event.

C *Order accordingly.*

Reported by Benjamin Yong

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